

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-7059

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RELAXATION PLUS COMMODORE, INC.,

Plaintiff-Appellant,

- against -

REALTY HOTELS, INC., THE HONORABLE HOWARD
THOMPSON, Individually and as Administrative
Judge of the Civil Court of the City of
New York, and "John Doe" (Fictitious name)
Individually and as City Marshal of the City
of New York,

Defendants-Appellees.

Docket No. 76-7059

BRIEF FOR THE APPELLANT

KASSNER & DETSKY
122 EAST 42ND STREET
NEW YORK, N. Y. 10017

Affidavit of Service Inside

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THE FACTS

Plaintiff operates a relaxation spa on a portion of the mezzaine floor of the Commodore Hotel, 42nd Street and Lexington Avenue, New York, New York, under a ten year lease dated March 28, 1972 which provides for the payment of \$27,000.00 annual rent, plus additional rent equal to the cost of electricity, which rent and electric payments are payable monthly on the first day of each month.

The said lease provides in Paragraph 41 thereof that:

"Tenant shall conduct its business in a high class manner and in a way so as not to bring discredit, shame or opprobrium upon landlord or the hotels which landlord operates. Nor shall tenant, its agents or employees engage in any lewd or lascivious activities or behavior either on the demised premises or in any of the hotels operated by landlord. If the general manager of the Commodore Hotel should in the exercise of his reasonable judgment and discretion determine that tenant is in default of this paragraph, he shall notify tenant of such default as provided in Paragraph 17. If, however, tenant should notify landlord within the time provided to cure the default in Paragraph 17, that it is not in default, the parties shall settle the matter by arbitration before the American Arbitration Association in accordance with the rules then obtaining of the American Arbitration Association and judgment upon the award rendered may be entered in any Court having jurisdiction thereof."

Paragraph 17 of the said lease provides as follows:

"(1) If tenant defaults in fulfilling any of the covenants of this lease other than the covenants for the payment of rent or additional rent..., then,... upon landlord serving a written five (5) days notice upon tenant specifying the nature of said default and upon the expiration of said five (5) days, if tenant shall have failed to comply with or remedy such default, or if the

said default or ~~omission~~ complained of shall be of a nature that the same cannot be completely cured or remedied within the said five (5) day period, and if tenant shall not have diligently commenced curing such default within such five (5) day period, and shall not thereafter with reasonable diligence and in good faith proceed to remedy or cure such default, then landlord may serve a written three (3) days notice of cancellation of this lease upon tenant, and upon the expiration of said three (3) days, this lease and the term thereunder shall end and expire as fully and completely as if the expiration of such three (3) day period were the day herein definitely fixed for the end and expiration of this lease and the term thereof and tenant shall then quit and surrender the demised premises to landlord but tenant shall remain liable as hereinafter provided.

(2) If the notice provided for in (1) hereof shall have been given, and the term shall expire as aforesaid;...then...landlord may without notice, reenter the demised premises either by force or otherwise, and dispossess tenant by summary proceedings or otherwise,..."

In the two and one-half years of occupancy under the aforesaid lease, defendant Realty Hotels, Inc., the landlord, and tenant appeared to have had no difficulty in their relations with each other with the exception of one isolated instance in March of 1973 when a letter was written by landlord relating to an advertisement of tenant. Rent and additional rent were always paid promptly.

In July, 1974, for reasons unknown to plaintiff at that time, landlord, without any notice whatsoever, commenced a summary proceeding to dispossess plaintiff from the premises. When these proceedings were withdrawn

without prejudice in September, landlord had already commenced a second dispossession proceeding which was withdrawn near the end of September, 1974. The instant proceeding was commenced in October of 1974 and sought the removal of plaintiff from the premises on the ground that the premises "are used and occupied by the respondent, or with the knowledge and consent of the respondent, as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for other illegal business or use." (Paragraph 9 of landlord's petition).

It cannot be overemphasized that plaintiff had been in the premises for a period of approximately two and one-half years during which time their business had been licensed by the Consumer Affairs Department of the City of New York and their masseuses had obtained licenses under the New York City Massage law (which has been ruled unconstitutional), there had not been one instance of police enforcement at the premises, there had been no complaints by customers of any illegality at the premises, landlord's roomers who had utilized the services of plaintiff had failed to make any complaints and had charged the cost of plaintiff's services to their rooms, and the premises had enjoyed a singularly high reputation as a leisure spa in the City of New York. It was only after the impending transfer of ownership of the hotel with an announced multi-million dollar renovation of the hotel came to the attention of plaintiff and explained the course of conduct of landlord in attempting to evict one of its best rent paying tenants from the hotel. Rather than negotiate the purchase of the seven and one-half year balance of plaintiff's term under the lease, landlord employed a law firm with an associated private detective agency (owned in whole or in part by at least one of the partners in such law firm) to make a case for eviction.

At the trial landlord presented six private detectives whom it employed for the purpose of establishing a case for eviction. These private detectives testified that they came to the premises on nine occasions over an approximately one-half year period, engaged eight girls to commit sexual acts, and gave the girls tips for such acts. It is notable that there was no testimony by appellees that these were the only men sent to the premises or that these were the only occasions that these men entered the premises.

It is also notable that the sole attempt by landlord to connect plaintiff to the alleged acts of misconduct by the eight girls employed by appellant was the testimony of one such private detective that on one occasion he was advised by a receptionist that an individual pointed out by her as the manager of the premises who was not otherwise identified, told this private investigator that it was possible to procure an act of masturbation or felatio in the premises, but it was impossible to procure an act of intercourse. On the basis of this alleged statement to a hired entraper of landlord, it was sought to establish that the officers, directors and stockholders of plaintiff had constructive notice that illegal acts were habitually and customarily performed on the premises.

To place the foregoing in its true perspective, it is necessary to outline the testimony relating to the extent of services and number of employees at the premises during the period in question. Plaintiff invested approximately \$250,000.00 in renovating what was a barber shop in the space at the Commodore Hotel. Approximately 18,000 massages are performed annually. Some 250 employees are employed by plaintiff at the premises each year with fifty girls being employed as masseuses at any one point in time.

In view of the foregoing, assuming the private detectives of landlord were telling the truth, the trial produced testimony that during a particular six month period in 1974, one out of each one thousand massages given at the premises resulted in illegal activity and one out of each fifteen or sixteen girls employed during that period disobeyed the printed house rules and the instructions of management and was entrapped into performing unlawful sexual acts in the hope of obtaining a larger tip from which neither plaintiff nor its management received one penny and as a result of which plaintiff is faced with the forfeiture of its extremely valuable leasehold and an investment of approximately \$250,000.00.

Let it be thought that management did not carefully screen all of its masseuses prior to employing them, the record established that extensive applications were made out by applicants for employment, these were checked, fingerprinting was had in connection with applications for masseuse licenses in order to insure that the girls had no police records and even lie detector tests were given in an attempt to assure that the girls would not go into business for themselves behind the private locked doors of their respective massage rooms. All that could have been done was done to assure that the operation of plaintiff at the premises would accord with the requirements of Paragraph 41 of the lease.

All that the testimony of landlord's paid entrapers established was that there may be circumstances under which legitimate, hard working intrinsically honest and moral women will be induced to perform sexual acts when "the price is right".

Landlord, however, did not seek to obtain plaintiff's compliance with Paragraph 41 of the lease. It gave no notice as required therein. It sought forfeiture rather than compliance. It sent its paid enticers, its

paid witnesses, into plaintiff's premises. It did not seek a police investigation which would be impartial. It did not seek an investigation by the Department of Consumer Affairs, the governmental body which licenses plaintiffs premises for it did not want an impartial investigation of plaintiff's business. It was the testimony of professional paid witnesses not of disinterested public officials which landlord required and sought.

When, on the very morning of trial, plaintiff was first apprised of the names of their employees who had allegedly committed unlawful acts on the premises, the dates when such acts were allegedly committed, and the persons with whom such acts were allegedly committed, the attorney for plaintiff sought a one day adjournment in order to investigate the claims. This was denied and the trial commenced immediately. By reason of the foregoing, it was impossible to prepare adequate cross-examination of the six private detectives or to prepare an adequate defense to their claims. Since well over one hundred girls were employed during the period of the alleged misconduct and only first names were given, the task of investigating these claims involving girls who could very well have no longer been in the employ of plaintiff at a time when the officers of plaintiff were actually in Court in the midst of the trial, became impossible. It cannot be overemphasized that a demand for the bill of particulars was served upon landlord on October 25, 1974, 53 days prior to the service thereof in the morning of trial, which demand was essentially identical to that which was served on plaintiff in the previous two dismissed proceedings, yet the bill of particulars was served upon plaintiff in Court after ten o'clock in the morning on December 17, 1974, the date of trial. Not only did the Judge deny an application for a one day adjournment to investigate the allegations of the

bill of particulars, the first statement by landlord of the facts of the alleged misconduct, but landlord told the jury that tenant had or should have had knowledge of these facts and did nothing about them and the trial court, in his decision adjudicated a forfeiture without opportunity to cure on the basis of a finding that plaintiff should have had knowledge of the charges and did nothing about them. Without the hard facts of the allegations, the names and times, it was impossible for plaintiff to investigate the allegations. Asking all of the over one hundred employees who had been employed as masseuses over the prior six months whether they had performed unlawful acts would have served no purpose since admissions would have resulted in immediate dismissals and this was known to the girls. Furthermore, less than half of the girls were still employed by plaintiff at the time of trial.

By reason of the foregoing, plaintiff could do little more at the trial than set forth its attempts to insure that its masseuses would be the type of women who would not be inclined to commit unlawful acts and that whatever acts could be taken to insure that they would not do so had been taken. It was virtually impossible to do the investigation necessary to insure a probing cross-examination of landlord's hired professional witnesses or to controvert their testimony. Thus, by a combination of landlord's tactical maneuver in waiting fifty-three days, until the morning of trial before serving its bill of particulars, and the Judge's failure to grant a one day continuance to allow investigation of the facts first gleaned therefrom, plaintiff was totally incapacitated from preparing and presented an adequate defense to the charges. It is respectfully submitted that even summary proceedings are not exempt from the minimal requirements of due process.

As has been noted heretofore, the lease provides for the payment of \$27,000.00 rent per annum in monthly installments of \$2,250.00. In addition, Paragraph 40 of the lease provides for the sale of electricity to the tenant on a rent inclusion basis at the rate of \$275.00 as follows:

"40...(c) Electricity - Tenant shall have the option of: ... (3) Purchasing electricity from landlord through its existing facilities on a rent inclusion basis. The amount to be included as rent to be determined by a mutually satisfactory or agreed to electrical engineer and reappraised every year during the term of the lease." (Underlining Supplied)

Landlord's comptroller admitted at the trial that in August, 1974 plaintiff paid to landlord the rent of \$2,250.00 and the \$275.00 for electricity. He further testified that in September landlord charged for the account of the plaintiff the additional sum of \$2,250.00 as rent and \$275.00 as electricity. He further testified that on October 23, 1974 landlord accepted \$275.00 for electricity and on October 31, 1974 landlord accepted \$550.00 for electricity and \$2,250.00 as rent. He stated that the rent was credited for the month of September, 1974, a month during which landlord refused to accept rent from plaintiff. A check for \$2,250.00 and another check for \$275.00 payable in November, 1974 was acknowledged by the comptroller who said that the sum was credited for rent during the month of October, 1974.

Since the said eviction proceedings were brought on by a petition verified October 22, 1974 which was served on or about October 25 or 26, 1974, the October 23, 1974 payment of \$275.00 described in the lease as "rent" was accepted by the landlord prior to the commencement of the said proceedings and after each of the alleged illegal acts described in its bill of particulars took place. The acceptance of rent payments and additional rent inclusion

electricity payments after the commencement of the proceedings similarly and naturally took place after landlord knew of all of the alleged acts of illegality which served as the basis for the said proceeding. It is, therefore, abundantly clear that landlord demanded, received and accepted rent with complete knowledge of the alleged illegal acts both prior to and after the commencement of the instant proceeding which acceptance has always been held under New York law to constitute a reaffirmation of the lease nullifying the proceeding below.

At the trial, the Judge ruled that under RPAPL 711-5 a summary proceeding for illegality could be maintained by the landlord without notice and without compliance with the lease agreement requiring such notice. He further held that there could be no waiver by a landlord of illegal occupancy and, consequently, acceptance of rent by the landlord after the commencement of the summary proceedings and after knowledge of the alleged illegal occupancy did not reaffirm the lease and terminate the proceeding. A judgment of eviction was rendered.

Plaintiff immediately appealed to the Appellate Term of the Supreme Court of the State of New York, First Department and applied to both the Trial Judge and the Appellate Term to fix the amount of an undertaking, which, if posted, would grant an automatic stay pursuant to the provisions of CPLR 5519 (a)6. Both applications for the performance of the aforesaid ministerial act were denied. Plaintiff thereupon commenced Mandamus proceedings in both the Appellate Division, First Department and the Supreme Court, New York County to compel the aforesaid Appellate Term and Trial Court respectively to perform the ministerial act of setting the amount of the undertaking. Prior to the return date of each of the respective motions in such Mandamus proceedings, the Trial

Court fixed an undertaking.

The appeal before the Appellate Term, First Department was duly perfected and argued. Among the issues argued were the following:

1. The landlord's service of a bill of particulars fifty-three days after demand therefor and one hour before jury selection, which bill of particulars set forth for the first time the names and times of the participants and occurrences of illegality which was the basis for the summary proceeding, combined with the failure of the Trial Court to grant a one day continuance sought by the tenant, constituted an abuse of discretion rising to the magnitude of due process denial by effectively preventing the tenant, charged with constructive notice of the alleged illegality, from preparing a defense, cross examining adverse witnesses, and presenting witnesses in its own behalf.
2. Tenant's acceptance of rent subsequent to notice of the alleged illegality and after commencement of the summary proceeding constituted a reaffirmation of the lease, vitiating the summary proceeding.
3. RPAPL 711-5, being remedial rather than substantive in nature, does not abrogate the provisions of the lease agreement relating to termination nor does it establish the substantive right to terminate for illegality which substantive right can only be found in the lease or in such statutory provisions as Multiple Dwelling Law 352 (makes a tenancy of all or a portion of a multiple dwelling in which prostitution is practiced terminable at the option of the landlord) or Real Property Law 231-1 (as construed by the recent Appellate Term, First Department case of 220 West 42nd Associates v. Cohen, 60 Misc. 2d 983, makes a tenancy voidable at the option of the landlord

by reason of illegal occupancy).

4. The petition is jurisdictionally defective by failing to state facts upon which it is based.

The Appellate Term, First Department rendered its decision affirming the judgment of eviction below, devoting virtually all of its opinion to Point 3 above with a short statement relating to Point 2 and a determination that no other issue was worthy of comment.

The Appellate Term decision agreed with the tenant that RPAPL 711-5 is remedial in nature, but found that RPL 231-1 superseded the lease agreement between the parties and voided the lease for illegality, requiring no notice of termination. It thus reversed its recent decision in the Cohen case (which held that the word "void" in RPL 231-1 meant "voidable") without even mentioning or distinguishing that case, and ignored completely Multiple Dwelling Law 352 which concerns itself exclusively with the factual pattern of the instant case, an allegation of prostitution in all or a portion of a multiple dwelling. Upon reargument it was pointed out to the Appellate Term that MDL 352 which was adopted long after RPL 231-1 and which made a tenancy of all or a portion of a multiple dwelling in which prostitution takes place "terminable at the election of the lessor", a meaningless statutory enactment if RPL 231-1 is construed to void just such a lease. This had no effect upon the Appellate Term.

As to the issue of acceptance of rent which had always been held to reaffirm the lease and terminate any summary proceedings, all the Appellate Term said was that illegality can never be waived. When it was pointed out to the Appellate Term on application for reargument that the

tenant was not claiming that the landlord, by acceptance of rent, had waived illegality for the term of the lease, but that it had merely reaffirmed the lease for such acts of illegality as form the basis for the pending summary proceeding, the Appellate Term refused to reconsider. When it was pointed out to the Appellate Term that this was the first case in New York jurisprudence which had held this way on the foregoing two issues with regard to a premises that had never been subjected to any law enforcement and whose landlord had never been subjected to any jeopardy notice by any governmental authority, this made no impression upon the Appellate Term. When the Cohen case, decided shortly before the instant case, was ignored in the Appellate Term decision despite its findings that RPL 231-1 established a lease as "voidable" and not "void" for illegality and held that the landlord had waived the illegality by acceptance of rent, the Appellate Term refused to reconsider its decision. As was noted heretofore, the Appellate Term decision discussed no other issues.

A motion for leave to appeal to the Appellate Division was first denied, but upon reargument was granted, with Judge Lupiano stating that the issues were worthy of a written opinion.

The result of the foregoing was a judgment of the Appellate Division affirming the judgment of eviction upon the opinion of the Appellate Term. A motion for leave to appeal to the Court of Appeals was denied by the Appellate Division and plaintiff has exhausted its State remedies since the Court of Appeals cannot entertain a motion for leave to appeal to it from a judgment rendered in the Civil Court in the City of New York.

POINT I

THE COURTS BELOW DISCRIMINATELY ENFORCED THE
ENTIRE BODY OF NEW YORK LANDLORD AND TENANT
LAW, WAIVER LAW, AND PLEADING AND DISCOVERY
LAW AGAINST PLAINTIFF AND CONSTRUED AND APPLIED
THE APPLICABLE STATUTES SO AS TO MAKE THEM
UNCONSTITUTIONALLY VIOLATIVE OF THE FOURTEENTH
AMENDMENT

Even if we assume that the statutes attacked herein as construed by the Courts of New York, are constitutional on their face, it is respectfully submitted that they have been discriminatorily enforced by the Courts of New York State against plaintiff in the landlord and tenant proceeding between plaintiff, as tenant, and defendant Realty Hotels, as landlord.

No concept is more firmly engrained in our constitutional law than the basic doctrine of Yick Wo v. Hopkins, 118 U.S. 356, 373-4,

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their right (it is a denial of equal protection)."

The New York Courts have turned the entire landlord and tenant statutory and common law on its head in the aforementioned summary proceeding to evict plaintiff herein from its premises and effect a forfeiture of its valuable leasehold. In so doing, they have made of plaintiff a unique member of a class of one. For the first

time, a tenant who has not been involved in any governmental law enforcement has been adjudged guilty of illegal occupancy by a landlord who has not been exposed to any jeopardy through the institution of a summary proceeding instituted in complete derogation of the lease between the parties during and after which proceeding the landlord continued to reaffirm the lease by acceptance of rent. Each and all of the foregoing represent "firsts" under New York law in derogation of all precedent, most of which has simply been ignored and the balance of which has been grossly misapplied to formally justify the invidious discriminatory law enforcement.

In the course of negotiating the lease, the parties herein, aware that part of the services to be rendered in tenant's premises would involve massages by female masseuses of male patrons behind closed and locked doors, foresaw the possibility that unlawful sexual activity might be indulged in by a few of the hundreds of masseuses employed in the course of giving the thousands of massages annually. Since tenant was required to invest approximately \$250,000.00 in changing the barber shop into a luxurious, high class health spa, it sought to protect itself against forfeiture of its ten year leasehold which could result from such unauthorized attempts by employees to increase their tips and further their own individual economic ends. It was in the light of this background that the parties negotiated Paragraph 41 of their lease to cover this precise situation. In that paragraph they provided that should tenant, its agents or employees engage in any lewd or lascivious activities, the general manager of

the landlord must notify tenant in accordance with Paragraph 17 of the lease (five days notice which pursuant to Paragraph 27 of the lease must be given by registered or certified mail) and, should tenant notify landlord within the said five day period that it is not in default, the dispute shall be settled by arbitration before the American Arbitration Association whose award may be entered in any Court of competent jurisdiction.

It is undisputed that the landlord failed to give, plead or prove such notice. It is the landlord's position herein, sustained by the trial court, but properly rejected by the Appellate Term, that no notice was required in a summary proceeding pursuant to the provisions of 711-5 of the RPAPL. It is respectfully submitted that this contention is wholly erroneous and that this is the sole area in which the Appellate Term decision was correct.

The petition herein correctly alleges that the Commodore Hotel is a multiple dwelling and that the lease premises are a part of such multiple dwelling. We must, therefore, look to the Multiple Dwelling Law to determine what rights are granted by it to a landlord with respect to a leasehold to a portion of a multiple dwelling allegedly used as a house of prostitution or assignation. Section 352 of the Multiple Dwelling Law specifically covers this situation and provides as follows:

"If a multiple dwelling, or any part thereof, shall be used as a house of prostitution or assignation with the permission of the lessee or his agent, the lease shall be terminable at the election of the lessor, and the owner shall

be entitled to recover possession of said premises by summary proceedings." (Underlining supplied)

Nothing could be clearer than this statute which rather than using such words as "void" or "voidable", spells out in unambiguous specifics that such lease is "terminable at the election of the lessor." It is not disputed herein that no such termination was ever made pursuant to the terms of the lease. Paragraph 17 of the lease clearly sets forth the manner in which the lease is to be terminated for cause, providing the requisite notice.

The foregoing should dispose of this case. Peculiarly, however, as was noted heretofore, the Appellate Term neither accepted the argument of appellant below nor of respondent below. It was appellant's position below that Section 711-5 of the RPAPL, by providing for the maintenance of a special proceeding to evict upon the grounds that the premises or any part thereof are used for purposes of prostitution, negated the requirement of notice in a lease and negated the provisions of Section 352 of the Multiple Dwelling Law heretofore referred to. The Appellate Term, however, rejected this argument and found that RPAPL 711-5 is merely the implement by which summary proceedings are made available to evict for illegal occupancy where such eviction is appropriate under substantive law. The Court then upheld the eviction of appellant without notice on the grounds that appellant's lease was void pursuant to the provisions of Real Property Law 231-1. It completely ignored its holding in 220 West West 42 Associates v. Cohen, 60 Misc. 2d 983 which construed the word "void" in 231-1 RPL as meaning "voidable". It did not even mention this recent case of its Court which held at Pages 985-6:

"A fair corollary to the foregoing is that when Subdivision 1 of Section 231 of the Real Property Law uses the word 'void', it means that the lease becomes 'void' at the option of the landlord. On the one hand, the landlord may not wish to insist on the forfeiture. On the other hand a tenant would not be permitted to abort a lease by performing illegal acts in the premises. Hence, the word 'void' in Subdivision 1 of Section 231 actually means voidable at the option of the landlord; and it was so stated long since (Saw v. McCarty, 59 How. Prac. 487, 489 (1880))".

Not only did the Appellate Term below ignore the Cohen case which it reversed silently, but it completely ignored MDL 352 which is and was directly on point on the facts alleged by the respondent in the instant case. Forgetting for the moment that the Appellate Term has totally disregarded a fundamental principle of judicial self-limitation engrafted in the concept of "stare decisis" by construing RPL 231-1 to mean exactly the opposite of what it had construed it to mean in its recent Cohen decision, the Appellate Term has done far worse; it now has allowed two diametrically opposed precedents from its Court to remain reported without one referring to the other. If a system of justice is to have any meaning or function, it must be predictable. If it is not predictable, how can the members of this society understand and follow rules of behavior to which they will be held accountable. How can they know their rights and their obligations?

As was noted heretofore, the Appellate Term decision ignored the existence of Section 352 of the Multiple Dwelling Law which specifically relates to prostitution carried on in a portion of a multiple dwelling. It instead relies upon the general language of Section 231-1 of the Real Property Law which refers to the carrying on of an illegal trade, manufacture or other business in a building. If Section 231.1 RPL is to be construed in the manner that the Appellate Term has construed it in this case

(as opposed to the manner in which it was construed in the Cohen case), then such provision, enacted in 1909 and deriving from a statute dating back to 1873), completely negates, voids, cancels, and nullifies the subsequently adopted Section 352 of the Multiple Dwelling Law (enacted in 1929) which unambiguously manifests the legislative intent that a leasehold to all or a part of a multiple dwelling used as a house of prostitution shall not be void but shall rather "be terminable at the election of the lessor." Even if RPL 231-1 does void a lease on grounds of illegality and such voiding applied to leaseholds in multiple dwellings used for prostitution prior to 1929, the enactment of Section 352 MDL by the Legislature of the State of New York in 1929, if such statutory enactment is to have any meaning whatsoever and to be given any effect whatsoever, changes such pre-existing law, at least with respect to the use of all or a part of a multiple dwelling leasehold for prostitution, making such leasehold terminable at the option of the lessor. By every law of statutory construction, Multiple Dwelling Law 352, ignored by the Appellate Term, directly governs this case. See: Statutes - Sections 76, 223 and 238.

It cannot be overemphasized that, as the Appellate Term held, 711 RPAPL is remedial rather than substantive in nature. As was said in Velazquez v. Thompson, 451 F. 2d 202, Second Circuit, 1971, the purpose of summary eviction proceedings is to facilitate landlord regaining possession quickly and inexpensively and thus avoid the plenary ejectment action and its incident delays which prompted resort to self-help.

Thus, it was the function of MDL 352 to incorporate into every

leasehold agreement to part or all of a multiple dwelling, whether oral, written or statutory, the right of a landlord to terminate a lease where the premises are being used for prostitution. The function of RPAPL 711-5, however, was to supply the remedy of summary proceedings to a landlord who elected to terminate his lease for such prostitution. Nowhere does RPAPL 711-5 state or indicate that summary proceedings are available thereunder in the case of the use of all or a part of a multiple dwelling for prostitution without the termination by the landlord of such tenancy as provided in MDL 352. See: Michaels v. Fishel, 169 N.Y. 381; 89-09 Sutphin v. Scarinzi, 187 Misc. 536. If, as landlord argued below and the trial court held, the illegal use of all or a part of a multiple dwelling voids the lease, requiring no notice of termination prior to the institution of summary proceedings, such effect must be found in the lease or in the substantive section, MDL 352, relating to exactly that type of activity. Since the lease and MDL 352 both require an election on the part of the lessor to terminate, notice of termination is required pursuant to the provisions of the lease prior to the institution of summary eviction proceedings under RPAPL 711-5. See also: O'Neill, Derderian, 249 N.Y. Supp. 519, 139 Misc. 888.

In view of the foregoing, it was incumbent upon the landlord to terminate the lease in accordance with its terms prior to the institution of summary proceedings. Paragraphs 17 and 41 clearly set forth the manner of termination for illegality. That the landlord herein failed

to comply with the terms of the lease, and, in fact, failed to give any notice of termination to the tenant, is undisputed. No notice was given, none was alleged in the petition, and none was proven at trial. The failure to give such notice constitutes non-curable jurisdictional defect.

Willace Realty Management, Inc. v. Henson, 319 N.Y.S. 2d 966, 66 Misc. 2d 303; Phaeton Realty Corp. v. Hugo Gnam & Son, 66 N.Y.S. 2d 296, 187 Misc. 1063; Frankel v. Rost, 70 N.Y.S. 2d 745, 272 App. Div. 334; Park Sheraton Corp. v. Grasso, 179 N.Y.S. 2d 697, 6 A.D. 2d 492.

This is not a case such as Shaff's Estate v. Stein, 14 N.Y.S. 2d 117, where the landlord received a jeopardy notice opening him to criminal or civil sanctions or penalties arising from his tenant's illegal use of the premises. In such case, it has been held,

"No alternative is available to the landlord even though it may not deem the conduct of the tenant objectionable, for omission or neglect to proceed is presumptive evidence of the landlord's own violation of the Penal Statute and renders it subject to prosecution thereunder."

Thus, in such a case, and only in such a case, it has been held that no termination of the tenancy is required of the landlord prior to the institution of summary proceedings. Shaff's Estate v. Stein, 14 N.Y.S. 2d 117, 120. This is not the instant case in which the Tenant was never the subject of either an arrest or conviction, was duly licensed by the Consumer Affairs Department of the City of New York, and no jeopardy notice had ever been sent to the landlord. It was the

landlord's choice and decision to attempt to terminate the tenancy for reasons of illegality. No compulsion was being exercised upon him to do so. It being the landlord's sole decision, it was compelled to act under the lease and terminate or attempt to terminate as therein provided. Central Sav. Bank v. Siegmund Werner, 28 N.Y.S. 2d 44 (A.T. 1st Dept.). Although irrelevant from the point of view of MDL 352, the Appellate Term concluded that the landlord had exposure under PL 230.40 if it failed to evict. Firstly, knowledge, not mere suspicion, is the basis for exposure. Secondly, what exposure could attach if the landlord promptly moved to terminate the lease after obtaining such knowledge? It should also be noted that there is no indication that the leased premises (a store) comprised a part of a multiple dwelling in Shaff's Estate so RPL 231-1 rather than MDL 352 controlled that case, unlike this.

By reason of the foregoing, it is respectfully submitted that there cannot be found one word in any statute nor one case to support landlord's position that it could abrogate the notice and termination requirements of its lease and of MDL 352, fail to terminate in accordance therewith, and successfully maintain summary proceedings.

The trial Court, in failing to dismiss for lack of notice of termination at the behest of tenant, ruled that notice was not required to sustain the summary proceeding for illegality in the instant case. It was apparently the Court's decision that the institution of a proceeding under 711-5 did not require notice of termination of the tenancy as mandated by the lease and MDL 352. This attempt to

expand 711 RPAPL past its remedial scope and as a negation of substantial rights, is not supported by any reading of that provision nor by the myriad cases which hold that the statutory provisions granting summary proceedings, being in derogation of the common law, must be strictly construed against the landlord. Markese v. Cooper, 333 N.Y.S. 2d 63, 70 Misc. 2d 478; Blozovich v. Tasber, 115 N.Y.S. 2d 801; East Bronx Properties, Inc. v. James, 103 N.Y.S. 2d 539, 200 Misc. 180 Grayson v. 240 Central Park South, 36 N.Y.S. 2d 293; 300 West Realty Co. v. Wood, 330 N.Y.S. 2d 524, 69 Misc. 2d 580, affirmed 330 N.Y.S. 2d 527, 69 Misc. 2d 582. The Appellate Term agreed that RPAPL 711-5 may not be read to negate the obligation of giving notice of termination. This is even more so where illegality is the basis for the summary proceeding since such proceeding is penal in nature and should be even more strictly construed. Janowitz v. Jenkins, 168 N.Y.S. 2d 739, 8 Misc. 2d 1077.

The Appellate Term decision which agrees that RPAPL 711-5 is remedial in nature and does not determine whether notice of termination need be given, nevertheless finds that no such notice need be given since the lease is void under 231-1 RPL. This issue has been discussed heretofore. The decision argues that since a landlord may be guilty of permitting prostitution under Penal Law 230.40 if he knowingly allows his leased premises to be used for prostitution, no notice of termination is required. This argument is fallacious. PL 230.40 could be construed to impose liability upon a landlord only if "he knows (the premises) are being used for prostitution (and) he fails to make

reasonable effort to halt or abate such use." If a landlord knew that his premises were being used for prostitution and immediately moved to terminate the lease by giving the appropriate notice of termination and then moving in summary proceedings for eviction, could it be conceivable that he would be held not to have made "reasonable effort to halt or abate such use." Would the fact that he gave the notice of termination required by both his lease and MDL 352 be held against him? The answer is obvious. Consequently, the Appellate Term argument is spurious. Further, as will be discussed, hereinafter, Penal Law 230.40 is unconstitutional and hence poses no threat to landlords.

In its decision, the Appellate Term cites its decision in Bakter v. Mimmo, 196 Misc. 245 as authority for the proposition that since the termination hereunder is not based upon RPAPL 711-1 (holdover) but rather upon RPL 231-1 and RPAPL Section 711-5, "it is not necessary to first terminate the term". Firstly, the case involved a different statute, unconsolidated laws 8558(b)(2), not the MDL 352 which controls the instant case. Secondly in that case it was held that opportunity to cure need not be given, not that the term need not be terminated where required by a lease or by a statute.

A third argument used by the Appellate Term to justify its decision is that since under RPAPL 715 summary proceedings could be instituted by various third parties after failure of the landlord to do so on five days notice to him, and since under that Section no notice of termination of the lease could or need be given by such third parties, the landlord may commence summary proceedings under RPAPL 711-5 without regard to termination clauses in his lease with the tenant. This non sequitor completely

ignores the fact that the third parties have no lease obligation with the tenant while the landlord does. It also ignores the fact that Multiple Dwelling Law 352 relates to the right of a landlord to terminate a lease but has no relation to what rights third parties may have to commence summary proceedings against a tenant.

By reason of the foregoing it is respectfully submitted that the decision by the Appellate Term on the issue of notice and termination is unsupported by logic, statute or case law, results in the nullification of the controlling statute, MDL 352, violates all rules of stare decisis by totally ignoring a recent controlling precedent of its Court, the Cohen case, and establishes a discriminatory enforcement of virtually the entire body of landlord and tenant law against plaintiff herein, effecting a forfeiture of a valuable leasehold interest by denying to plaintiff equal protection of the laws. Plaintiff has been treated as a class of one.

This is further accentuated by the determination of the waiver issue. It is uncontested that the landlord accepted tenant's rent through the month of August, 1974, long after its receipt of information from its investigators that illegal acts were allegedly being performed on the premises by tenant's employees. It is the testimony of the landlord's accountant that no rent was collected for September and October of 1974 until landlord received and accepted a \$2250.00 rent payment in early

November which it applied to September rent and a \$275.00 rent inclusion payment which it received on October 23rd and a \$550.00 rent inclusion payment which it received on October 31st. The landlord's accountant further testified that billings to the tenant continued through the trial (October, November, December, 1974).

As was noted heretofore, Paragraph 40 of the lease provides for the tenant's purchase of electricity from the landlord on a rent inclusion basis, thereby constituting the \$275.00 monthly payment (one of which was made on October 23, 1974 and two of which were made on October 31, 1974) as rent. Since the notice of petition and petition were served upon the appellant on October 25 or October 26, 1974, it is clear that the landlord accepted rent from appellant only two or three days prior to the commencement of the summary proceeding herein and days and weeks thereafter. While it is the position of the tenant that it sent the rent for September and October to landlord promptly, with the rent for October being returned to tenant and the rent for September never being returned, this is relatively irrelevant for the purpose of this analysis. What is important is that immediately prior to the commencement of the summary proceeding and soon thereafter landlord concededly collected rent from tenant. It is respectfully submitted that such rent acceptance both prior to and subsequent to the commencement of the summary proceeding herein constituted a reaffirmation of the lease inimicable to termination, vitiating the said proceeding.

Landlord's bill of particulars and the proof at trial establishes beyond doubt that the illegal acts allegedly performed on tenant's premises took place between June 21 and October 10, 1974. It is likewise clear that landlord accepted a rent inclusion payment of \$275.00 after knowledge of all of the foregoing acts and prior to the commencement of the instant summary proceeding. It is likewise clear that after the commencement of the instant summary proceeding additional rent inclusion payments and rent were accepted.

It cannot be doubted that it has been consistently held by the Courts of New York that the acceptance of rent with knowledge of a cause for forfeiture by the tenant affirms the existence of the lease and recognizes the lessee as a tenant of landlord waiving such forfeiture, at least for the period preceeding the payment of rent. Wollard v. Schaeffer Stores Co., 272 N.Y. 304; Ireland v. Nichols, 46 N.Y. 413. This is the law whether the acceptance of rent is prior to the commencement of the holdover, Atkinson v. Trehan, 334 N.Y.S. 2d 293, 70 Misc. 2d 614, and even if illegal occupancy is the grounds for the summary proceedings. Howard v. Major Air Coach Systems, Inc. 118 N.Y.S. 2d 607; 220 West 42nd Associates v. Cohen, 60 Misc. 2d 983. It is certainly the law where the payment and acceptance of rent is made after the commencement of the summary proceeding unless there is statutory authority for such acceptance. Olivero v. Duran, 70 Misc. 2d 882. Thus, in order to avoid the implicit reaffirmation of a lease inherent in the acceptance of rent after knowledge of the breach of the lease which gives rise to a summary proceeding, the second sentence

of 711-1 of the RPAPL was adopted to permit the landlord to accept rent after the commencement of a summary proceeding under that sub-division without reaffirming the lease. Similarly, the last sentence of 711-3 of the RPAPL negates a waiver arising from the acceptance of rent in the case of a summary proceeding under that sub-division. It is notable that no such provision is contained in Section 711-5 of the RPAPL. Since it is clear from both the contention of landlord and the determination of the trial court that the eviction was not brought for breach of a substantial covenant of the lease under Section 711-1 but rather under 711-5, the landlord, defendant herein, had no statutory authority for the acceptance of rent after the commencement of the 711-5 summary proceedings. It, therefore, cannot be denied that, as New York Courts have always held, retention of rent even where illegality is alleged, "is deemed an assent to the continuance of the tenancy (Matter of Walker v. Ribotsky, 275 App. Div. 112)." 220 West 42 Associates v. Cohen, supra, at 986. In the foregoing case, the Appellate Term of this department cited Woolard v. Schaeffer, supra as well as Prizep v. Wadler, 217 N.Y.S. 2d 746, and Masauts v. Viviani, 276 App. Div. 777.

It should be noted that it has recently been held that even if that proceeding were brought pursuant to 711-1 RPAPL, where the rent was paid by a commercial tenant and accepted by the landlord for the month when the lease was allegedly terminated, summary holdover proceedings could not be maintained. Olivero v. Duran, 334 N.Y.S. 2d 930, 70 Misc. 2d 882.

The Appellate Term decision sets forth a brief paragraph on this point which concludes that there can be no waiver by a landlord of an illegal use since "the enforcement of such a waiver would violate the public policy", citing two cases. The first case, 47 East 74th Street Corp. v. Simon, 188 Misc. 885, is one in which notice of illegal use and opportunity to cure was given to the tenant by the landlord, the tenant failed to cure the illegal occupancy, and the landlord brought summary proceedings to evict under the predecessor to RPAPL 711-5. The facts of the case do not indicate that any rent was accepted by the landlord after the sending of the notices or after the commencement of the summary proceedings. In a brief per curiam decision of the Appellate Term, it was held that the notices, first of default with opportunity to cure and then of termination, were sufficient under the lease and under the price control regulations then in effect. It then gratuitously stated that in any event no notice was required under the predecessor to RPAPL 711-5, citing Shaff's Estate v. Stein, supra, erroneously (heretofore discussed). In a second dicta pronouncement, it stated that a landlord cannot waive the right to remove a tenant for an occupancy in violation of statute. The facts of the case do not indicate that such issue was raised. The second case cited by the Appellate Term for the proposition that a landlord may not waive illegal occupancy is Shapiro v. Collins, 12 Misc. 2d 71, reversed on other grounds, 6 App. Div. 2d 1038. In that case the sole holding was that the motive of a tenant in bringing an eviction

proceeding for illegal use is immaterial.

It might be helpful to analyze the one paragraph statement of the Appellant Term on this issue. No distinction was drawn by the Appellate Term between two classes of waiver. In the first class there is the situation where certain contractual rights of the landlord are not insisted upon for a period of time and the landlord is therefore held to have waived those contractual rights set forth in the lease for the entire term of the lease. This is the classic waiver situation and pertains to such matters as the maintenance of various appliances or animals in the demised premises with the knowledge of the landlord for a sufficient period of time to warrant the conclusion that the landlord has consented to such maintenance. A second type of waiver is that which we are concerned with in this case, the reaffirmation of the lease by the landlord at a time when he was aware of acts by the tenant which either breached the contractual relation between the parties or constituted an illegal occupancy, yet were such that the Court would not imply a modification of the lease agreement to permit such activities in futuro. Thus, while in the first class of cases, the waiver by the landlord constituted a modification of the terms of the agreement between the parties for the entire leasehold term, in the latter group of cases it merely barred the landlord from seeking a forfeiture of the lease by reason of the acts of the tenant which transpired prior to the landlord's reaffirmation of the lease.

While it cannot be doubted that in a case of illegal occupancy the

landlord cannot by acquiescence, either express or implied, legalize and sanction such continued illegal occupancy, he can reaffirm the lease as to past conduct by acceptance of rent with full knowledge thereof. Of course, if such illegal occupancy continues after such reaffirmation, the landlord may proceed to terminate the lease.

A distinction must also be drawn between occupancies which are inherently unlawful and which are not subject to being cured and occupancies which are readily curable. In the former case it would be fruitless to invoke a doctrine of waiver, while in the latter case there is every reason to enable the tenant to avoid forfeiture if he is inclined to do so. If the Appellate Term doctrine of non-waiver in all cases of illegality were adjoined to, it should be applied with equal vigor to restaurant premises which have failed to adequately duct their interior rest rooms, tailor shops which have failed to obtain licenses from the Consumer Affairs Department of the City of New York, and hotels whose chambermaids or cocktail waitresses occasionally dabble in prostitution. It has never been so applied. This is the first case of its kind defying all precedent.

POINT II

WHERE LANDLORD'S BILL OF PARTICULARS SETTING FORTH FOR THE FIRST TIME THE NAMES OF PARTICIPANTS AND TIMES OF OCCURRENCE OF ALLEGED ILLEGALITY WHICH WAS THE BASIS FOR THE SUMMARY PROCEEDINGS, WAS SERVED ONE HOUR PRIOR TO JURY SELECTION. THE TRIAL COURT'S FAILURE TO GRANT APPELLANT'S APPLICATION FOR CONTINUANCE CONSTITUTED A DENIAL OF DUE PROCESS, PARTICULARLY WHERE THE PLEADING FAILED TO GIVE ANY NOTICE OF THE FACTS UNDERLYING THE GROUNDS FOR EVICTION

The state proceeding was the third in a series of summary proceedings

commenced by landlord against tenant for eviction on grounds of illegal occupancy of the premises. The first such proceeding was commenced on July 24, 1974 and the second on September 4, 1974. In each of the said proceedings, tenant had served a demand for a bill of particulars virtually identical to that which was served in the final proceeding on October 25, 1974, virtually the day that the notice of petition and petition were served on tenant. In each of the three demands for a bill of particulars tenant sought the names of the alleged participants in the acts of illegality and the dates when such acts of illegality took place in its premises. Since all of the alleged acts of illegality had transpired prior to October 25, 1974, landlord should have had no difficulty in responding to the said bill of particulars promptly. As was admitted at the trial, landlord had in its possession written reports specifying the aforesaid information and delivered by each of its paid private investigators who had taken part in the alleged acts of illegality.

Notwithstanding the foregoing, and for no possible purpose other than to obtain the tactical advantage of non-disclosure, landlord delivered the bill of particulars setting forth the aforesaid ultimate facts, the basis of its case, on the morning of December 17, 1974, fifty-three days after service of the demand for a bill of particulars, and one hour prior to jury selection in the case.

Counsel for tenant immediately moved for a one day continuance to enable him to investigate the facts first gleaned from the bill of particulars, the names of the patrons who allegedly obtained illegal

services, the names of the employees of tenant who allegedly performed such illegal services and the dates and times when such illegal services were allegedly performed. The trial court denied the motion for continuance and ordered the immediate selection of a jury. The testimony of the private investigators of landlord, the patrons allegedly securing the illegal services at tenant's premises, went into evidence with little probing cross-examination since counsel for tenant could not investigate the facts and could not adequately question those witnesses. By reason of the foregoing, tenant was effectively denied the opportunity to prepare and meet the charges against it, the essence of a fair hearing within the meaning of due process.

While it is hornbook law, requiring no citation, that ordinarily, the grant of a continuance rests within the sound discretion of the trial court, it is likewise undisputable that where such discretion is abused, such determination is reversible error and can reach the dimensions of due process violation.

Thus, the Appellate Division, First Department, has held that where the trial court granted leave to the plaintiff, on the eve of trial, to amend its complaint on the issue of damages and denied the defendant's application for a continuance, such denial was an abuse of discretion and error. Penn Plaza Venture v. Glens Falls Insurance Company, 340 N.Y.S. 2d 734, 41 A.D. 2d 619. Similarly, the same Court, in Martel v. Blankli Realty, 37 App. Div. 2d 769, held that where the Court granted the defendant's motion to amend its answer, plaintiff was entitled to a continuance of the trial to procure witnesses. In another Appellate

Division case, Kruger v. Holland Furnace Co., 208 N.Y.S. 2d 285 12 App. Div. 2d 44, it was held that plaintiff's failure to permit inspection of her hospital records warranted a continuance to be granted to defendant for the purpose of making such inspection. Cases outside the State of New York are likewise in accord with the proposition that a continuance is absolutely mandated to a party who, on the eve of trial, is confronted with the disclosure of new facts or theories by the other side which such party has not been dillatory in making. See: Missouri Pacific R. Co. v. Burrow, 195 Ark. 980, 115 S. W. 2d 262.

The foregoing case law rests clearly upon the concept that the right to a fair hearing within the meaning of due process, includes the right to know the claims of one's opponent, Gonzalez v. United States, 348 U.S. 407, the right to have a reasonable time to investigate the facts and the law, to garner witnesses, and to prepare an intelligent, informed position, Newton v. Municipal Housing, 72 Misc. 2d 633, and the right to challenge the evidence against one by means of such preparation, Williams v. White Plains Housing Authority, 35 App. Div. 2d 965.

It cannot be denied that where a special or summary proceeding fails to afford the essential elements of procedural due process, it is invalid. Central Savings Bank v. City of New York, 279 N.Y. 266, Cert. Denied, 306 U.S. 661. What then is this procedural due process without which a proceeding is void? In Mullane v. Central Hanover Trust Co., 339 U. S. 306, 314 it was held:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably claculated, under all the circumstances, to apprise interested parties of

the pendency of the action and afford then an opportunity to present their objection...the notice must be of such nature as reasonably to convey the required information...and it must afford a reasonable time for those interested to make their appearance."

In Hecht v. Monaghan, 307 N.Y. 461, 470, the New York Court of Appeals held:

"...no essential element of a fair trial can be dispensed with unless waived. That means, among other things, that the party whose rights are being determined must be fully apprised of the claims of the opposing party and of the evidence to be considered, and must be given the opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal."

If, as the cases hold, a party has a right to know the evidence upon which an adjudication is sought and to examine, explain and rebut such evidence, United States v. Gillman, 146 F. 2d 572; Cherneckoff v. U. S., 219 F. 2d 721, how can a party be forced to trial within an hour after learning the basic facts upon which a determination against him is sought? How can he examine, explain and rebut the evidence and cross-examine the witnesses without adequate time to prepare and investigate?

In Williams v. White Plains Housing Authority, supra, at 965 involving an eviction proceeding conducted by an administrative agency, it was held:

"...the hearing which the authority is mandated to furnish tenants...prior to their eviction from a housing authority project must comply with minimal standards of due process (citations omitted). Among these standards are adequate notice both of the acts which form the basis of the tenant's alleged undesirability and the consequences of an adverse determination, together with the right to be represented by counsel, to confront witnesses and to challenge the evidence upon which the authority relies in making its determination."

Similarly in Newton v. Municipal Housing, supra, at 638, it was held that a hearing to evict which was conducted two days after notice of the facts

violates due process, the Court stating:

"Adequate notice, in this context, affords the defendant time to obtain and consult with counsel, time for counsel to arm himself with facts and law, to garner available witnesses favorable to the defense and to prepare an intelligent, informed position."

The aforesaid cases involved due process applicable to administrative hearings to evict tenants. How much more so should due process apply to judicial proceedings of eviction.

As has been noted heretofore, the New York cases are in conformity with precedents in other jurisdictions. Thus, where asserted facts arose only a few days before trial and counsel had only the weekend to investigate such facts, and the amended complaint setting forth such new facts was not filed until the date of the hearing, it has been held by the United States Circuit Court of Appeals for Texas that it was a denial of due process to deny a continuance to the other party even though the Court granted him an opportunity to present "offer of proof" of evidence which he would have introduced if time had permitted the proper presentation of a defense. Russell-Newman Manufacturing Co. v. NLRB, 370 F. 2d 980. See also State v. Perry, 103 S. E. 2d 404, 248 N.C. 334.

While we shall discuss in another portion of this brief the inadequacy of petition to state the facts upon which relief could be granted and to meet minimal requirements of due process notice, it should be mentioned at this point that the general conclusory allegations of the petition made it impossible for the appellant herein to prepare an

adequate defense without the factual statements set forth in the bill of particulars and served on the morning of trial. The failure to grant a continuance, when requested at that time, stripped appellant of its ability to confront its accusers and rebut their contentions. This turned the entire trial into a one sided sham proceeding, a charade in violation of all tenets of due process.

By reason of the foregoing, it is respectfully submitted that the trial court denial of a continuance to appellant under the circumstances of this case constituted a dire abuse of discretion rising in magnitude to the status of a denial of due process.

Not only is this a further example of discriminatory law enforcement and denial to plaintiff of equal protection, but it establishes RPAPL 711.5 procedures, as applied to plaintiff, as unconstitutionally violative of procedural due process.

This is further reinforced by the vague pleadings authorized in the summary proceeding. Section 74-4 RPAPL sets forth the jurisdictional requisites of a petition in a special proceeding as follows:

"Contents of petition: The petition shall:...

4. State the facts upon which the special proceeding is based."

Failure to comply with the foregoing constitutes a jurisdictional defect which vitiates and nullifies the proceeding. Margolies v. Lawrence, 67 Misc. 2d 468, 324 N.Y.S. 2d 418; Goldman Bros. v. Forester, 62 Misc. 2d 812, 309 N.Y.S. 2d 694; Giannini v. Stuart, 6 App. Div. 2d 418, 178 N.Y.S. 2d 709; Kling's Estate v. Perl, 173 Misc. 2d 249, 17 N.Y.S. 2d 550; Nathan's Famous v. Frankorana, 70 Misc. 2d 452, 333 N.Y.S. 2d 708.

Furthermore, it has been consistently held that because summary eviction is in derogation of the common law, the statutory special proceeding authorizing such summary eviction must be strictly complied with and the statutory enactment itself must be strictly construed against the petitioner in any such special proceeding. Markese v. Cooper, 70 Misc. 2d 478, 333 N.Y.S. 2d 63; Blozevich v. Tasber, 116 N.Y.S. 2d 801; East Bronx Properties v. James, 200 Misc. 180, 103 N.Y.S. 2d 539; Grayson v. 240 Central Park South, 36 N.Y.S. 2d 293; 300 West Realty Co. v. Wood, 69 Misc. 2d 580, 330 N.Y.S. 2d 524, affirmed 69 Misc. 2d 582, 330 N.Y.S. 2d 527; Garrison v. Abrams, 57 Misc. 2d 417, 293 N.Y.S. 2d 52. It has also been held that where such summary proceeding is based upon alleged illegality, it is penal in nature and must be even more strictly construed. Janowitz v. Jenkins, 8 Misc. 2d 1077, 168 N.Y.S. 2d 739.

In accordance with the foregoing, Blozevich, Grayson, and Garrison cases heretofore cited, have held that the requisites of the petition in such special proceeding must be strictly complied with and construed in order to vest jurisdiction in the Court.

By reason of the foregoing, in special proceedings, unlike normal judicial proceedings which are not in derogation of the common law, it has been consistently held that petitions are not amendable for the purpose of supplying a non clerical defect. Dahmen v. Gregory, 184 Misc. 724, 55 N.Y.S. 2d 311; 34 and 7 Realopp Corp. v. Seafood City, 71 Misc. 2d 302, 335 N.Y.S. 2d 940; Goldman Bros. v. Forester, supra.

The petition in the landlord-tenant proceeding alleges in the

disjunctive as grounds for eviction:

"9. That the said demised premises are used and occupied by the respondent, or with the knowledge and consent of respondent, as a bawdy house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for other illegal business or use in that the respondent, its agents, servants or employees, are using or occupying the said premises, or causing or permitting the said premises to be used and occupied, for the purposes of advancing, profiting from and promoting prostitution or knowingly permitting prostitution in the said premises; which prostitution consisted and consists of sexual conduct engaged in, for a fee, by persons in the employ of the respondent, with patrons of the respondent in said premises, said sexual conduct consisting of acts of fellatio, masturbation and physical contact with the unclothed genitals of patrons of the respondent for purposes of sexual gratification." (Underlining Supplied)

It is apparent from the foregoing that the landlord set forth in its petition little, if anything, more than the statutory grounds provided in Section 711-5 RPAPL for maintaining a special proceeding on grounds of illegality. By setting forth all of the possible forms of illegality mentioned in that section, and doing so in the disjunctive, it elected or selected none. To the allegations of a former petition in an action discontinued for insufficiency of the factual basis of the petition, landlord, not truly comprehending the grounds for such discontinuance, added a statement that persons in the employ of tenant, committed prostitution by means of performing various types of sexual conduct for a fee with patrons of tenant, all of which is known to tenant or is being performed for the purposes of tenant's profit.

Nowhere in the petition is there an allegation that on a particular date the tenant knowingly permitted a particular person to engage in a

particular act of sexual conduct for a particular fee with a particular patron, Because summary proceedings, by their very nature, do not permit the discovery available in virtually all other forms of litigation, it has been mandated that in such special proceedings the facts, not the conclusions, underlying the proceeding must be clearly set forth in the petition. Without such a rule, it would be virtually impossible for a respondent such as appellant herein to investigate the allegations and prepare an informed defense. As was noted heretofore, the facts of this proceeding were first made known to appellant in a bill of particulars served fifty-three days after demanded and one hour before jury selection. Having employed over one hundred masseuses who gave approximately nine thousand massages during the period of the alleged acts of illegality, could it be expected of tenants to meet the allegations of the petition without such specific information, particularly where there was no proof at the trial that any of the officers, directors or stockholders of tenant had personal knowledge of such acts? It is for this reason that basic facts underlying the grounds for a special proceeding, rather than conclusions, must be pleaded in order to comply with procedural due process.

In the state case landlord did its best to conceal the basic facts in order to prevent tenant from investigating such facts and preparing a defense. As has been stated heretofore, and as the evidence at the trial clearly adduced, landlord was in possession of written private detective reports as to all of the acts of alleged illegality prior to receipt by it of the demand for a bill of particulars to which

it did not respond for a period of fifty-three days. It is likewise clear that such facts and reports were in its possession at the time that landlord prepared and served its petition herein. It was clearly the intention of landlord to conceal from tenant, until the moment of trial, which of over one hundred masseuses it would claim performed illegal acts on the premises and when such illegal acts were performed. Because of the substantial turnover in employment of masseuses by tenant, it was undoubtedly hoped by appellees that many, if not all, of the eight masseuses who allegedly performed illegal acts over a nearly six month period prior to the service of the petition would have left the employ of tenant and be unavailable for questioning or to give testimony. This tactical concealment of the essential facts of the instant proceeding served landlord well. The trial Judge refused a one day adjournment when sought by tenant after the service of the bill of particulars one hour before trial, and tenant was thereby incapacitated from investigating the facts of the instant proceeding, intelligently cross-examining the six paid private investigators, and presenting testimony directly in rebuttal thereof. The evil that Section 741-4 of the RPAPL sought to avoid by requiring factual pleading in the petition, permeated the entire trial. In the words of the Court in Olivero v. Duran, 70 Misc. 2d 882, 334, N.Y.S. 2d 930, at 887:

"...The petition merely sets forth a conclusion on the part of the landlord rather than the facts upon which he relies. How can the respondents possibly know what they must defend themselves against and how can they properly interpose any valid legal defenses they might be entitled to under these circumstances?"

In Goldman Bros. v. Forester, supra, where the petition alleged rental arrears of \$827.02 with no breakdown of the factual basis for the claim of such alleged arrears, the petition was held jurisdictionally defective.

In Giannini v. Stuart, supra, the allegation that the premises are decontrolled was held to be a conclusion without a pleading in the petition of the factual basis for such conclusion. The proceeding was held to be jurisdictionally defective.

In Kling's Estate v. Perl, supra, the allegation in the petition that the tenant occupied the premises in violation of Penal Law Section 1146 prohibiting the keeping of disorderly houses, was held to be a conclusion without the pleading of the facts underlying such conclusion despite the fact that attached to the said petition was a police department notice stating that the premises were kept as a disorderly house. The petition was held to be jurisdictionally defective.

In Nathan's Famous v. Frankorama, supra, the allegation by the landlord in its petition of the failure of the tenant to make franchise payments and the termination of the lease by reason thereof, was held to be a conclusory statement rather than the required pleading of facts necessary to sustain the jurisdiction of the Court in that summary proceeding.

How can any of the foregoing cases be distinguished from the case involved herein? Kling's Estate v. Perl, supra, is particularly on point. The petition in the instant case is even more defective than that in Kling's Estate. In the instant case there is no allegation in the

petition of any statutory authority for the bringing of this special proceeding. It could be placed just as readily within the procedural provisions of Section 711-1 as 711-5 of the RPAPL. There is no reference in the petition to either Section 352 of the Multiple Dwelling Law or Section 231-1 of the Real Property Law, the two substantive statutory enactments under which the instant proceeding could have been brought. At least in Kling's Estate, the statutory basis for the proceeding was clearly set forth as was the compulsive nature of the police action which required the bringing of the proceeding. Furthermore, since the petition in the instant case pleaded in the disjunctive each and all of the four grounds under a 711-5 for the bringing of a special proceeding of summary eviction, it never advised tenant of which of those four grounds the alleged sexual conduct for a fee would be held to encompass. At least in Kling's Estate, the landlord pinpointed the keeping of a disorderly house as the grounds for the proceeding.

It should also be noted that in each of the aforecited decisions the tenant would be presumed to know the factual basis for the commencement of the summary proceedings, if, in fact, the conclusory allegations were true. Thus in Margolies the tenant would know how he received the notice to quit, in Goldman Bros. the tenant would know how the \$827.02 of arrears were accumulated, in Giannini the tenant would know why the premises were decontrolled, in Kling's Estate the tenant would know in what manner it was keeping a disorderly house and in Nathan's Famous, the tenant would know in what regard he failed to make franchise payments. In the instant case, however, where it was neither alleged nor proven that the tenant had

any specific knowledge of the acts of prostitution generally alleged, it was essential for him to be apprised by the petition of facts which would enable him to investigate the factual basis for the proceeding and prepare for trial.

It cannot be doubted that, as the Appellate Division of the First Department held in Giannini v. Stuart, supra, Page 420,

"A tenant is entitled to a concise statement of the ultimate facts upon which the proceeding is predicated so that the issues, if any there be, are properly raised and can be met. The allegation in the petition is a bare conclusion and it follows that the pleading is jurisdictionally defective and must be dismissed."

It cannot be overemphasized that the failure to plead the facts in the said petition did more than create a mere technical jurisdictional defect as in a number of the afore quoted cases. It deprived the tenant of its ability to investigate the facts and charges, prepare a defense, cross-examine witnesses, and present witnesses in its behalf. As such, it resulted in the denial to tenant of due process. As has been noted heretofore, a fair hearing within the meaning of due process implies the right to know the claims of one's opponent, Gonzalez v. United States, 348 U.S. 407, the right to have a reasonable time to investigate the facts and the law, to garner witnesses and to prepare an intelligent, informed position, Newton v. Municipal Housing, 72 Misc. 2d 663, and the right to challenge the adversary's evidence by means of such preparation, Williams v. White Plains Housing Authority, 35 App. Div. 2d 965. See also Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314; Hecht v. Monaghan, 307 N.Y. 461, 470.

The statement in the petition setting forth the grounds upon which the proceeding is based as set forth in Paragraph 9 of the petition amounts at best to no more than an allegation that prostitution is being committed on the premises by employees of tenant, with the actual or constructive knowledge of tenant, and such acts warrant the commencement of a special proceeding to evict. If these are not conclusions as opposed to facts, all of the cases heretofore cited were wrongly decided. Nowhere is it alleged that a particular person on a particular date did a particular act. Nowhere is it alleged how the conclusion that tenant knew or consented to such illegal conduct was arrived at. Nowhere did these conclusory allegations give the tenant sufficient information to defend itself. How does this verbatim incorporation of the words of a remedial statute, 711-5 RPAPL, with the addition of a general prostitution allegation differ in any degree from the Kling case's statement of a violation of a specified substantive statute, Penal Law 1146, accompanied by a jeopardy notice? How do the conclusory allegations herein differ from the defective conclusory pleading on Kalmanash v. Smith, 291 N.Y. 142?

By reason of the foregoing it is respectfully submitted that the petition therein was constitutionally defective by reason of its pleading of conclusory allegations, concealment of facts and disjunctive pleading, each and all of which violated plaintiff's right to equal protection and due process. Further, since RPRPL 711-5 has been applied to warrant such pleadings while denying discovery and not requiring the service of a bill of particulars until one hour before trial, the said section is violative of the Fourteenth Amendment as so construed and applied.

POINT III

PENAL LAW 230 ET. SEG. OF THE STATE OF NEW YORK
IS UNCONSTITUTIONALLY VIOLATIVE OF THE FIRST,
NINTH AND FOURTEENTH AMENDMENTS AND CONSEQUENTLY,
PLAINTIFF'S PROCEEDINGS IN LANDLORD-TENANT COURT
WERE UNCONSTITUTIONAL

In the landlord and tenant proceeding involving the plaintiff herein, the eviction was based upon the alleged performance on the premises of the plaintiff of acts of prostitution which created an unlawful occupancy of the premises. The definition of prostitution is set forth in Section 230 of the Penal Law of the State of New York. If that section is unconstitutional, the acts alleged to have been performed by plaintiff's employees on the premises which gave rise to the summary proceedings were not unlawful and hence any statutes authorizing eviction on the basis of such acts are themselves void and unconstitutional. If this is the case, the eviction of plaintiff cannot be sustained.

Penal Law 230.00 provides as follows:

"A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."

The only case in the State of New York defining the words "sexual conduct" is the case of People v. Block, 71 Misc. 2d. In this case it was held that "sexual conduct" is defined as,

"Acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast."
Id. at 715.

In the same case the word "fee" is defined as:

"Payment for return for professional services rendered." Id. at 716.

In the landlord-tenant proceeding it was alleged that the paid private investigators of the landlord entered the premises, paid a fee for a massage, received the massage, engaged the masseuse in a conversation leading to the performance of "sexual conduct" upon a promise of a "tip", and, after dressing, and while in the public area of the premises, voluntarily gave the masseuse a "tip". This was the word used by the landlord's witnesses to characterize the money paid by them to plaintiff's employees.

As a result of such payment, the landlord, defendant Realty Hotels herein, commenced summary proceedings to evict the plaintiff on grounds of illegal occupancy of the premises founded upon such alleged "prostitution".

The constitutional infirmities of the prostitution laws of the State of New York make the various civil disabilities incorporated in New York statutes such as MDL 352, RPL 231-1 and RPAPL 711-5 based in whole or in part thereon unconstitutional in violation of the First, Ninth and Fourteenth Amendments.

a. The definition of prostitution is vague within the meaning of Fourteenth Amendment due process in that it fails to give adequate notice of the nature of the proscribed act. If we accept the lower court definition of "sexual conduct" heretofore referred to, that term is not vague (but rather overbroad as hereinafter discussed). The term "fee", however, even as defined by the New York Courts is constitutionally vague. Does it include a voluntary tip given to a

masseuse after completion of sexual conduct where there is obviously no way for such masseuse to enforce any right thereto or to collect same should her patron refuse to give such tip? This is the uncontroverted state of facts presented by the landlord in the proceeding involving plaintiff herein. Where in the provisions of Penal Law 230.00 is there set forth fair notice that the foregoing would come within its proscription? It should be recalled that in the landlord and tenant proceeding, the record reveals that the masseuses were advised by plaintiff that the performance of sexual acts was forbidden and would result in discharge, that the payments to the masseuses were referred to by the landlord's witnesses as "tips", and that such tips were given after such witnesses had completed the sexual acts, dressed and entered the public lounge area of the premises. Furthermore, there was not one iota of testimony to indicate that any of the plaintiff's masseuses asked for a "tip" after the alleged sexual acts were performed.

In view of the foregoing, can it be said that the provisions of PL 230.00 gave plaintiff's masseuses adequate notice of the proscribed acts and that their alleged activities were within the ambit of PL 230.00.

b. PL 230.00 when applied to sexual conduct between consenting non-married adults is violative of the First, Ninth and Fourteenth Amendments in that

1. It is overbroad in its proscription of "sexual conduct" as defined by New York case law.

Can there be any doubt that the right of two adult people of the opposite sex to associate, touch, dance and even engage in "sexual

conduct" short of sexual intercourse or deviate sexual intercourse is a fundamental right protected by the First Amendment as well as the penumbra of liberties falling within the Ninth and Fourteenth Amendments. See Griswold v. Connecticut, 381 U.S. 479. Could the State outlaw dancing or petting by adults? How does the fact that the payment of a fee is involved make this fundamentally protected activity any less so? Does the fact that a film, book or newspaper is created, exhibited or published for profit make it any less the subject of First Amendment protection? The answer is obvious. Pittsburgh Press Co. v. Human Relations Comm., 413 U.S. 376, 384-5. In New York Times v. Sullivan, 376 U.S. 254, 266, the Court disposed of this economic argument perfunctorily by saying:

"That the Times was paid for publishing this advertisement is as immaterial in the connection as is the fact that newspapers and books are sold."

The examples of overbreadth of this prostitution statute are mind boggling. It could not only proscribe social dancing in a dime-a-dance establishment, but also the performance of a professional dancer who, by reason of clothed genital and breast touching, which is an incident of any dance, have performed "sexual conduct" for a fee (which is paid them for their performance). Does the mistress whose rent is paid by her lover, the wife who is supported by her husband, the girl friend whose meal and show are paid by her date, perform "sexual conduct" for a fee?

It is no answer to a claim of overbreadth to argue that the statute

has not and would not be applied to such a case. United Transp. Union v. State Bar of Michigan, 401 U.S. 576, 581; Keyishian v. Board of Regents, 385 U.S. 589, 599. As was said in NAACP v. Button, 371 U.S. 415, 438,

"(W)e cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights."

for

"The objectionable quality of vagueness and overbreadth does not depend on absence of fair notice of a criminally accused...but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." (Underlining supplied) Id. at 432-3.

Lest it be asked what relationship plaintiff's business has to the exercise of First, Ninth and Fourteenth Amendment rights, it should be noted that the activity alleged to be performed and proscribed involves the most intimate and private concern of a person, his sexual life. As in Griswold v. Connecticut, supra, and Roe v. Wade, 410 U.S. 113, we deal with an area so fundamentally personal, intimate and private as to virtually demand non-intervention by government. The State of New York, recognizing this, has for over a century withdrawn from its attempt to proscribe or even regulate sexual conduct between consenting adults (fornication laws). This has recognized the fundamental privacy of and right of non-married adults to satiate their most basic sexual drives and to meet and associate with each other for such purpose. If this private joinder and association between two non-married consenting adults

does not fall within the rights of privacy and association inherent in the First, Ninth and Fourteenth Amendment, what does?

The fact that a fee is involved should have no effect. If we concede that the sex drive is basic and satisfaction thereof must be permitted by society, are we to permit such gratification only to the seducers who are capable of achieving their ends without payment of a fee? What of the millions of unmarried unfortunates who by reason of physical, emotional or personality disorder or disability cannot seduce but must pay. Are these unfortunates to be denied their fundamental liberty to satisfy sexual drives? Further, it is not the disabled rich whose actions would be proscribed but only the poor who cannot pay the rent on a mistress' apartment or buy her the fur coat which induces her cooperation. The disabled poor cannot even wine and dine a prospective bed partner. They are relegated to marriage among each other, usually at a too tender age, or the cheapest form of sexual gratification, payment of a fee on each occasion. Can this be denied them?

What, if any, compelling governmental interest justifies this inhibition of fundamental personal liberty? In Griswold v. Connecticut, supra, at 498 the interest of the State in enacting its anti-birth control statute was analyzed. The State argued that its object was to prevent extramarital relations. Justice Goldberg responded,

"But, in any event, it is clear that the State interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reacting far beyond the evil sought to be dealt with..."

As was said in Shelton v. Tucker, 364 U.S. 479, 488, legislative goals,

"cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

If there was any contemporary rational nexus or compelling governmental interest underlying the prostitution laws it could certainly be achieved by regulation rather than proscription. If the law were meant to deter the spread of social disease, such aim could be achieved by licensing and periodic medical examinations. If the law were meant to deter the sexual servicing of minors, identification requirements could be imposed or a doctrine of absolute liability similar to that involving the sale of liquor could be enacted. If the locale of such services is a legitimate matter of concern, zoning laws could restrict the areas of permissible activity. If street solicitation is considered repugnant, this area of solicitation could be limited or proscribed. In any event proscription of fundamental rights is not appropriate where the legitimate or compelling ends sought to be achieved can be more narrowly achieved through appropriate regulation. Dunn v. Blumstein, 405 U.S. 330; Elfbrandt v. Russell, 384 U.S. 11; Police Dept. of Chicago v. Mosley, 408 U.S. 92; Cantwell v. Conn., 310 U.S. 296.

Where, as in the case of prostitution laws the State proscribes as criminal the gratification of a most fundamental biological need to a significant segment of the population, those who cannot obtain such gratification without payment of a fee therefor, there would appear to be

no conceivable governmental interest, rational or compelling, which could justify such legislation.

2. It proscribes a fundamental right based upon a classification, payment of a fee, without a compelling State interest in violation of the equal protection provisions of the Fourteenth Amendment.

The need of adults to engage in sexual activity is so fundamental a biological and psychological necessity as to rank third to the need to breathe and eat and drink among basic needs. This cannot be disputed. Where the law has imposed reasonable limitations upon the gratification of such need, such as by condemning incest, statutory rape, rape, adultery and sodomy, such proscriptions have been upheld.

Where, however, mores have changed, proscriptive classifications theretofore thought reasonable, have been annuled as unreasonable. Thus, in the State of New York, there has not been a reported fornication prosecution in the past century and no statute exists which prohibits sexual intercourse or "sexual conduct" between two non-married consenting adults of opposite sexes. The prostitution statutes do, however, proscribe such activity "for a fee".

What is there about the payment of a fee which would justify the proscription of an act otherwise lawful? What rational basis or compelling interest could justify the penal sanction of an otherwise lawful activity merely because of the payment of a fee?

Even where the activity sought to be proscribed does not involve the exercise of a fundamental right, any statutory classification

which has no rational nexus to legitimate ends sought to be achieved thereby violates the equal protection provisions of the Fourteenth Amendment. Gulf, etc. R. Co. v. Ellis, 165 U.S. 154; Eisenstadt v. Baird, 405 U.S. 438.

Where, however, as in the instant case, the classification involves the proscription of a fundamental right, it must be founded, not upon a rational nexus, but a compelling State interest. NAACP v. Button, 371 U.S. 415, 438; Williams v. Rhodes, 393 U.S. 23, 31; Storer v. Brown, 415 U.S. 729; American Party of Texas v. White, 415 U.S. 767, 780-1; Kramer v. Union Free School District, 395 U.S. 621, 627; Shapiro v. Thompson, 394 U.S. 618, 634.

The Supreme Court has long recognized that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees, that help give them life and substance. Poe v. Ullman, 367 U.S. 497, 516-522." Griswold v. Connecticut, 381 U.S. 479, 484. Thus, the Fourth and Fifth Amendments were held in Boyd v. U. S., 116 U.S. 616, 630 as prohibiting governmental intrusion into "the sanctity of a man's home and privacies of life." Similarly in Mapp v. Ohio, 367 U.S. 643, 656, the Court held that the Fourth Amendment established a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See also Breard v. Alexandria, 341 U.S. 622, 626, 644; Public Utilities Commission v. Pollak, 343 U.S. 451; Monroe v. Pape, 365 U.S. 167; Lanza v. New York, 370 U.S. 139; Frank v. Maryland, 359 U.S. 360, Skinner v. Oklahoma, 316 U.S. 535.

In Olmstead v. U. S., 227 U.S. 438, 478, Justice Brandeis, in a

prophetic dissent, announced the now accepted principle establishing the right of human privacy as fundamental,

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness...They conferred, as against the Government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized man." (Underlining supplied)

In Stanley v. Georgia, 394 U.S. 557, it was held that even criminal activity such as possession of obscene material could not be proscribed when such possession was private, i.e., in one's home. The Court unanimously upheld the fundamental right of privacy even to possess matter which, if possessed outside the home, would be criminal, saying at 564:

"For also fundamental is the right to be free, except in very limited circumstances, from unwanted intrusions into one's privacy."

The prostitution statutes attacked herein are no less applicable in one's home than outside. As such they are clearly overbroad. The sole distinguishing classification is between sexual conduct for a fee and sexual conduct without fee. What compelling or even rational, governmental interest can be conceived which would justify the classification.

It cannot be argued that the payment of a fee for sex increases the incidence of disease or unwanted pregnancy. These arguments, if once valid, were made to deter non-marital sex, activity now accepted by law and practiced, if surveys are to be believed, by virtually the entire non-married adult population.

Since the adultery law proscribes extramarital sex, whether for a fee or not, it, and not the prostitution laws, are aimed at maintaining the sanctity of the marital relationship. Abandoned fornication laws

were incidentally suited for that purpose, but the commercial aspect of "sexual conduct" cannot possibly relate thereto.

It cannot be maintained that prostitution is inherently evil or immoral, and, therefore, strikes at the heart of civilization since the number of societies which have sanctioned this practice of the "oldest profession" throughout history are virtually incalculable. Even in the United States, today, there are communities in which prostitution is legal. This is similarly true throughout the Western World.

It should also be noted that throughout history, whenever and wherever prostitution was condemned, so was non-marital sex (fornication). It was not the commercial aspect that gave rise to the sanction, but rather the unsanctified (religiously speaking) sexual union.

Thus, it is only today, in America, where we have come to acknowledge the inherent fundamental right of consenting unmarried unrelated adults to engage in sexual activity, that the anachronism of prostitution laws remains in the statute books despite the acknowledgement of the foregoing fundamental human right.

Certainly, with birth control methods of today, there can be no claim that prostitution laws are aimed against unwanted pregnancies and illegitimate births. Similarly, with the ready availability of wonder drugs, the spread of social disease cannot serve as a legitimate fear at which prostitution laws are aimed. In any event, the fee classification of the crime bears no relation to either of the foregoing since both are as likely to transpire whether the "sexual conduct" is indulged in for a fee or not, and neither can transpire with respect to numerous acts

included in the definition of "sexual conduct". The inclusion of breast touching, clothed genital contact, and masturbation in the definition of "sexual conduct" clearly illustrates that pregnancy and disease are not the evils at which the prostitution laws are directed.

We are left then with a fee classification that is unfounded upon any modern day rational nexus or compelling governmental interest. It is merely an anachronism dating from Victorian times when any sexual relationship outside of marriage was considered evil and hence proscribable. With the abandonment of this concept and repeal of the fornication laws engendered thereby, there can be no justification for maintaining prostitution laws founded upon a fee classification.

THE DECISION OF
THE COURT BELOW
WAS IN ERROR

The first paragraph of Page 3 of the opinion of Judge Werker, hereinafter referred to herein as the "opinion", concludes "that there is no case or controversy here involved as between any officer of the state and the plaintiff". The opinion goes on in the second paragraph on Page 3 to state,

"Plaintiff's case in essence is one requesting this Court to review the actions taken by the trial court, the Appellate Term and the Appellate Division. Its charge against these courts of conspiracy to discriminatorily apply and enforce these laws is patently absurd."

With all due respect to Judge Werker, plaintiff respectfully submits herein that if the facts alleged in the complaint are true, and they must be accepted as such for the purposes of determining whether a Three-Judge Court should be appointed, the allegation of discriminatory law enforcement by the judiciary is not only not "absurd" but is rather "apparent". The reason that the Judges who allegedly discriminatorily apply the laws of the State of New York against the plaintiff herein were not made parties defendant herein, is that they are not subject to a damage award by reason of their judicial immunity and any injunctive relief against them, as opposed to the defendants herein, could serve no purpose. It is

the defendants herein who are seeking to remove plaintiff from possession pursuant to the judgments issued "with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States." Yick Wo v. Hopkins, 118 U.S. 356, 373, cited in footnote 3 of the opinion.

The statement in the opinion that the instant case presents no case or controversy between plaintiff on the one hand and the defendants on the other cannot be sustained. It certainly is not contended that there is no case of controversy between plaintiff and defendant Realty Hotels, Inc. since it is that defendant which has petitioned for and will benefit from the eviction of plaintiff secured by unconstitutional means under unconstitutional statutes. Judge Edward Thompson being the administrative head of the Civil Court out of which the warrant of eviction must issued is certainly a party interested in upholding the issuance of the said warrant. The Marshal of the City of New York who will be designated to serve the 72 hour notice of eviction based upon the warrant of eviction is certainly a party as to whom restraint will be sought herein and who will be acting to obtain the 72 hour notice of eviction pursuant to the said warrant and to enforce same by removing plaintiff from possession. Thus, plaintiff has brought action herein against the basic party in interest, the landlord who has secured and who seeks to enforce the unconstitutional warrant, the Judge who has overall administration of the Court issuing the said warrant and the Marshal whose duty it will be to enforce same.

No authority need be cited that a non-state official acting in concert with state officials who violate the constitutional rights of a person is subject to suit under the Civil Rights Acts. No authority need be cited that not all those who violate a person's constitutional rights need be made parties defendant in the said action. What we have in the instant case is a controversy, initially between two private entities, resolved to plaintiff's detriment by unconstitutional state action under unconstitutional state statutes, which resolution is threatened to be enforced by the intervention of the private individual and at least one of the two public officials who are made parties defendant. It cannot be disputed that the action is justiciable, i.e., presented in an adversary fashion with concrete legal issues capable of definitive and final determination. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-241; See Also: Flast v. Cohen, 392 U.S. 83, 94-97. What the opinion seems to imply is that judicial action by state officers which allegedly deprives a plaintiff of his constitutional rights is not governmental action within the meaning of the Civil Rights Act. This is clearly erroneous. Kenney v. Fox, 132 Fed. Supp. 305, affirmed 232 Fed. 2d 288; Galella v. Onassis, U.S.D.C.N.Y., 353 Fed. Supp. 196, affirmed in part and reversed in part on other grounds, 487 Fed. 2d 986. For the Court below to state, as it has in its opinion, that to charge these Courts with conspiracy to discriminatorily apply and enforce the laws is patently absurd, is to deny (1) that state judicial action can deprive a person of civil rights within the meaning of the Federal Civil Rights Acts, and (2) that the allegations of a complaint in a civil rights action are to be presumed to be true for purpose of determining whether the complaint is frivolous or substantial.

In the course of oral argument with respect to the grant of a temporary restraining order, the Court below indicated that it believed that the federal anti-injunction statute effected his right to grant relief herein. When the case of Mitchum v. Foster, 407 U.S. 225 was called to the Court's attention, it was believed by deponent that this would put an end to this argument. Nevertheless, on Page 3 of the opinion, the Court, while recognizing that a civil rights act complaint is excepted from the federal anti-injunction statute, indicates that it is prepared to invoke the Younger v. Harris abstention doctrine in the instant case. Since, however, the dismissal of the action is based upon a determination in the last paragraph of the opinion "that no substantial federal question has been raised by plaintiff's complaint," it is apparent that abstention was not the basis for the dismissal. It should be noted that while a convoluted argument based upon Huffman v. Pursue, Ltd., 420 U.S. 592 might be made to support abstention in the instant case, the abstention would not effect all of the causes of action set forth in the complaint. It certainly would not effect the cause of action based upon discriminatory law enforcement nor would it effect the cause of action based upon denial of procedural due process. Abstention can only be invoked by the Three-Judge Court. Abele v. Markle, 425 F.2d 1121.

On Pages 4 and 5 of the opinion, the Court analyzes one of the four separate and distinct attacks made upon Penal Law 230.00, the claim that it is unconstitutionally vague, and cites Roth v. U. S., 354 U.S. 476, for the proposition that a statute is not vague if its language "conveys sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices." It should be noted that while the foregoing homily has frequently been cited, the Roth case was silently reversed by the United States Supreme Court in Miller v. California, 413 U.S. 15, which held that an obscenity

statute which did not specifically set forth the sexual conduct sought to be prescribed was unconstitutional. If it is the position of Judge Werker that the words "sexual conduct" and "fee" are as definite, certain, and specific as possible, I respectfully submit that he is in error. The United States Supreme Court in Miller v. California, supra, clearly indicated that it could formulate a listing of "sexual conduct" which was specific and which would give fair warning of the type of activity, the portrayal of which could give rise to obscenity prosecution, and without which listing a state obscenity law would be void.

At the bottom of Page 4 of the opinion, Judge Werker cites Paris Adult Theatre v. Slaton, 413 U.S. 49 as specific approval by the Supreme Court of State regulation of prostitution in a commercial setting in a public building. Since that case was involved with obscenity and not with prostitution, it is unclear how it supports Judge Werker's principle. In any event, how can it be said that Section 230.00 of the Penal Law of the State of New York is limited to enforcement "in a public building". It is obvious that it is not so limited.

The attempt on Page 5 of the opinion to analogize Penal Law 230.00 to the Mann Act is incongruous in view of the fact that there is no body of case law defining the terms of Penal Law 230.00 as there is with the Mann Act. It cannot be overemphasized that there is not one decision of state wide impact that defines any of the terms in Penal Law 230.00.

As was noted heretofore, the overbreadth arguments, equal protection arguments, and all of the various other arguments made with respect to the unconstitutionality of Penal Law 230.00 have not even been discussed in the opinion. It is respectfully submitted that they were not discussed because they are unanswerable. Judge Werker

has merely accepted the prostitution statute of the State of New York as unavailable by virtue of his subjective inclination to consider an attack on any prostitution law as "frivolous" just as he subjectively believes that any assertion of discriminatory law enforcement against a judicial branch of the state government is "patently absurd". Rather than subject the arguments of plaintiff herein to analysis, Judge Werker manifests an underlying subjective prejudice against the ideas and supports it by inapplicable precedents amplified by heat generating adjectives.

In the first complete paragraph on Page 5 of the opinion, the Court below again cites the concurring opinion of Justice Burger in Mitchum v. Foster, supra, as the reason for ignoring the holding in Steffel v. Thompson, 415 U.S. 452, that irreparable injury need not be shown as a condition for seeking declaratory relief in a Civil Rights Act case. The opinion goes on to state that the fact that plaintiff is threatened with the loss of its business, the deprivation of a long term lease, and the forfeiture of a \$250,000.00 investment does not establish that plaintiff has no adequate remedy at law. He believes that a suit for damages against the bankrupt Penn-Central Railroad, the parent of the defendant Realty Hotels, Inc. is a satisfactory remedy. If this were an adequate remedy at law, when would there be no adequate remedy at law? If the Honorable Judge Werker were threatened with the loss of his lifetime appointment as a Federal Judge without a hearing and on the sole basis of a presidential order, would he say that his remedy at law for his salary was an adequate remedy or would he contend that he would have a right to urge irreparable injury and seek injunctive relief? The opinion, on Page 5, urges that plaintiff might have a good cause of action against defendant Realty Hotels, Inc. for breach of its

obligations under Paragraphs 41 and 17 of its lease. This is urged despite the fact that the Courts of the State of New York have finally determined in the landlord and tenant proceeding between plaintiff and defendant Realty Hotels, Inc. that the lease is void and that plaintiff has no rights thereunder. This issue is not under appeal to the Court of Appeals in the State of New York at this time since leave to appeal on that issue has been denied by the New York Courts. It is interesting to note that the opinion indicates that there has been a breach of the lease by defendant Realty Hotels, Inc. with the resultant forfeiture of plaintiff's rights, yet the Court below believes it is incapable of abating the resultant deprivation which has been sanctioned by unconstitutional means under unconstitutional statutes in a discriminatory manner.

On the bottom of Page 5 and on top of Page 6 of the opinion, attention is called to the fact that plaintiff is appealing to the Court of Appeals of the State of New York by reason of the deprivation of its rights under the State Constitution. The action herein does not interfere in any way with that appeal and does not concern itself with the issues raised therein. How the Court of Appeals of the State of New York elects to interpret the New York State Constitution is not subject to review by this Court except insofar as such construction might violate the Federal Constitution. The fact that the Court of Appeals might vindicate plaintiff's rights in that other proceeding does not effect the assertion by plaintiff of its rights under the Federal Constitution. Attention is called to the time honored and oft quoted statement in Zwicker v. Koota, 289 U.S. 241, 252,

"...congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision

of his federal constitutional claims. Plainly escape from that duty is not permissible merely because state courts also have the solemn responsibility, equally with the federal courts '...to guard, enforce and protect every right granted or secured by the Constitution of the United States....' Robb v. Connolly, 111 U.S. 624. We yet like to believe that wherever the federal courts sit, human rights under the federal constitution are always a proper subject for adjudication, and we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum".

It is interesting to note that despite discussing abstention under Younger v. Harris, the dismissal is not based upon that theory. It is also interesting to note that after alleging that plaintiff has an adequate remedy at law, not having shown irreparable injury, the dismissal is not based on that theory. In the final paragraph of the opinion, Judge Werker concludes that "no substantial federal question has been raised by plaintiff's complaint." It is respectfully submitted that except for the brief discussion of the issue of vagueness of Penal Law 230.00, Judge Werker has failed to analyze or discuss in his opinion any of the more than a half dozen constitutional arguments urged by the plaintiff in its complaint. With all due respect to Judge Werker, plaintiff does not accept statements such as "is patently absurd" and "is frivolous" as a substitute for legal analysis and precedent. They represent no more clarification than "argumentum ad hominum".

It is respectfully submitted that plaintiff has raised a number of extremely significant constitutional questions in the instant proceeding which cannot and must not be dismissed with a disdainful shrug. Notwithstanding the opinion of Judge Werker, the threat of irreparable injury facing the plaintiff herein is not only great but immediate.

CONCLUSION

Aside from the clear due process question raised herein with respect to the vague pleading, belated particularization thereof and denial of an opportunity to appellant herein to prepare a defense in the landlord and tenant proceeding below, the complaint herein presents two relatively novel issues which require innovative analysis.

Firstly, is a party denied equal protection of the law by State Courts which so ignore, misconstrue and misapply State statutes and case law as to make it apparent that such party was treated as a "class of one" and was subject to unique and individualized discriminatory law enforcement? While first impression might lead one to believe that all that is sought by plaintiff is a Federal Court review of a State Court's determination, this is not the case. If the discriminatory law enforcement in the State Court case were mandated by statute, the Federal Court would have no problem finding the statute facially void. Why then should the discriminatory application of an entire body of statutory enactments and its related case law be any less proscribable?

Secondly, should a vague discriminatory statute which has no modern day rational nexus to any legitimate State ends, proscribes fundamental rights without a compelling governmental interest, and invades an area of the most intimate individual privacy of the human being be immune to contemporary attack merely by reason of its antiquity?

These are the issues raised herein which were given short shift by the Court below whose only function was to determine whether the issues

were frivolous and, if not, whether temporary injunctive relief was warranted.

It is respectfully submitted that each and every issue raised in this case, the traditional as well as the innovative, ~~raise~~ substantial constitutional questions which cannot and must not be cavalierly and summarily dismissed.

Respectfully submitted,

KASSNER & DETSKY, P. C.

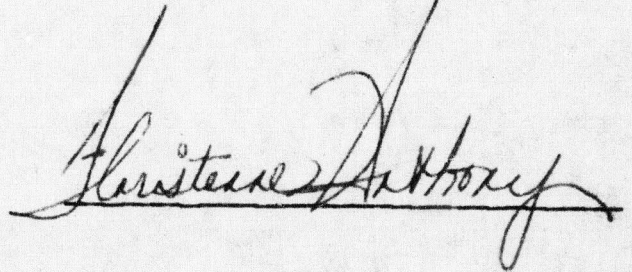
Herbert S. Kassner

of Counsel

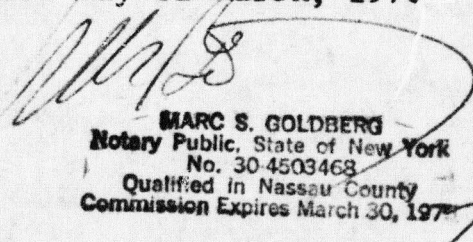
STATE OF NEW YORK)
 :
COUNTY OF NEW YORK)

SS.:

FLORISTEANE ANTHONY, being duly sworn, deposes and says:
that deponent is not a party to the action, is over 18 years of
age and resides at 122 East 42nd Street, New York, New York, 10017.
That on the 30th day of March, 1976, deponent served the
Appellant's Brief and Appendix upon Wohl, Lipton, Loewe, Stettner,
Becker, and Krim, Esqs., attorneys for Realty Hotels, Inc. at 10
East 40th Street, New York, New York, 10016, and Louis J.
Lefkowitz, Attorney General of the State of New York, Ralph
McMurry, Assist. Attorney General, attorney for Edward Thompson,
at 2 World Trade Center, New York, New York 10047 by depositing
a true copy of the same enclosed in a post paid properly addressed
envelope in an official depository under the exclusive care and
custody of the United States Post Office Department within New
York State.



Sworn to before me this
30th day of March, 1976



MARC S. GOLDBERG
Notary Public, State of New York
No. 30-4503468
Qualified in Nassau County
Commission Expires March 30, 1977